Supreme Court, U.S.
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No. 94-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NICHOLAS SERBEN,
Petitioner,

v.

INTER-CITY MANUFACTURING CO., INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED BY PETITIONER

1. When an employer offers employment to an applicant to replace a discrimination claimant three months after terminating the claimant, may that offer of employment serve to satisfy the element of the *McDonnell Douglas v. Green* scheme for making a prima facie case that the claimant show that he/she was replaced by a younger worker. (sic)

2. When a plaintiff denies that his employment was terminated because of a reduction in force (RIF), produces evidence that the total number of employees did not change, presents evidence proving the traditional elements of a prima facie case and presents credible evidence that the stated reason for termination was mere pretext, fabrication and untruthful, may the court nonetheless require the additional showing of specific direct or circumstantial evidence that age was a determining factor, which is required in RIF case, in order to submit the case to the jury. (sic)

LIST OF PARTIES

Nicholas Serben, Petitioner, is an individual residing in the State of Missouri. Respondent, Inter-City Manufacturing Co., Inc., is a Missouri corporation with its principal place of business in St. Louis, Missouri.

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Respondent, Inter-City Manufacturing Co., Inc. respectfully requests that the Court deny the Petition for a Writ of Certiorari requested herein.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 36 F.3d 765 (8th Cir. 1994) and is reproduced in Petitioner's Appendix (hereinafter "Pt. App.") at pages A-2 through A-4.

The memoranda decisions of the United States District Court for the Eastern District of Missouri (Perry, U.S.M.J.) have not been reported. They are reproduced in Petitioner's Appendix at pages A-5 through A-11.

JURISDICTION

This Court has jurisdiction to review the judgment dated September 30, 1994 of the Eighth Circuit Court of Appeals by a Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

The Eighth Circuit Court of Appeals had jurisdiction over the appeal from the judgment of the United States Magistrate pursuant to 28 U.S.C. §636(c)(1-3) and 28 U.S.C. §1291. The United States Magistrate tried the case below by consent of the parties pursuant to 28 U.S.C. §636(c)(1). The District Court below had jurisdiction of this claim of violation of the Age Discrimination in Employment Act (ADEA) (29 U.S.C. §621, *et seq.*) pursuant to 28 U.S.C. §1331.

STATEMENT OF THE CASE

Petitioner alleged that his termination was because of his age in violation of the ADEA. The undisputed facts in this case are that Petitioner, when 52 years old, was hired for a new Sales Manager position. Within a few months of his hire, Respondent lost two very large customers, the expected revenue from which was 1.2 million dollars. Petitioner then put together a sales revenue forecast for the fiscal year beginning November 1, 1990, which predicted favorable results despite the loss of the two large customers. However, two months into the fiscal year, it became apparent that Petitioner's projections would not be met. Respondent began certain cost-saving steps. Respondent concluded that it could do without a Sales Manager position and return to having certain top officers of the company perform those duties as they had before the creation of the Sales Manager position and the hiring of Petitioner. The Sales Manager position was completely

eliminated. The Sales Manager position was never reinstituted. Petitioner was the same age when he was terminated as when he was hired.[1]

During the period of time when Respondent was attempting to cut costs, Petitioner chose not to replace one of Petitioner's subordinate *sales (customer) service* representatives. Petitioner claims to have taken on some of that employee's responsibilities. That position, according to Petitioner himself, due to the business conditions then prevailing, remained open at the time of Petitioner's discharge. The Petition herein incorrectly leads the Court to believe that, at the time of Petitioner's termination, Respondent had a sales (customer) service position open for which it was seeking applications. Petitioner's own testimony at trial was that, at the time of his termination, Respondent was not looking to fill the sales (customer) service position due to the economic conditions which still prevailed. Thus, Petitioner's Sales Manager position was eliminated and there was no sales (customer) service position to be filled at the time of his discharge. Likewise, the Petition herein incorrectly states that Respondent offered the sales (customer) service position to a younger applicant at the same time that Respondent informed Petitioner that he was being terminated. Contrary to the statement of the Petitioner herein, there was a reduction in the workforce. Petitioner's Sales Manager position was completely eliminated and never reinstituted. A sales (customer) service representative who had resigned had not been replaced. The total number of employees of the Respondent may have fluctuated from time to time. However, that Petitioner's position was eliminated cannot be disputed.

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[1] Petitioner incorrectly suggests that Petitioner was, at the time of his discharge, merely training for the Sales Manager position. While he may not have assumed the full complement of duties, he came with numerous years of sales manager experience in the industry. He was not a trainee.

While the jury found in favor of Petitioner and the District Court overruled Respondent's Motion for Judgment as a matter of law, the United States Court of Appeals for the Eighth Circuit reversed the judgment outright concluding that Petitioner "presented no direct evidence of age discrimination nor sufficient circumstantial evidence from which the jury could reasonably infer that Petitioner's age actually motivated his employer's decision." (Pt. App. A-3). *Serben v. Inter-City Manufacturing Co., Inc.*, 36 F.3d 765 (8th Cir. 1994).

SUMMARY OF ARGUMENT

This is not a case appropriate for the granting of a Writ of Certiorari. No inference of discrimination can flow from an employer's refusal to offer a terminated employee a position which is not open at the time of his termination. Moreover, a terminated employee cannot establish that he was replaced by a younger employee for purposes of establishing a *prima facie* case under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) by showing that an employer did not hire him into a different position which did not become open until months after the employee was terminated. The Eighth Circuit did not impose a more stringent burden of proof on Petitioner when it required Petitioner to produce evidence of the age discrimination.

REASONS FOR DENYING THE PETITION FOR A WRIT

Rule 10 of the Rules of the Supreme Court of the United States provides that "[A] petition for a writ of certiorari will be granted *only when there are special and important reasons therefor.*" Petitioner does not suggest that the decision of the Eighth Circuit Court of Appeals conflicts with any decision of this Court or that of any other circuit. Petitioner does not suggest that the decision of the Eighth Circuit Court of Appeals deviates from the accepted and usual course of proceedings. In sum, there is nothing special or far-reaching about the decision of the Eighth Circuit which would justify the consideration of this Court.

I. Response to Point I that Petitioner was Replaced by a Younger Employee as Required by *McDonnell Douglas v. Green*

Contrary to the assertions of Petitioner, the evidence did not show that he was replaced by a younger worker. The undisputed facts are that Petitioner was hired to be the Sales Manager with a $36,000.00 per year salary. Contrary to the impression that Petitioner attempts to paint in this Petition, Petitioner had many years of sales management experience in related industries before being hired by Respondent. There was no training period. When the very large customers were lost shortly after his arrival, a sales (customer) service representative (salary $19,500.00 annually) in Petitioner's sales organization resigned and was not replaced in an effort to cut costs. The resigned sales (customer) service representative's duties were spread among several other employees, including Petitioner. Economic conditions, according to Petitioner, did not warrant the hiring of a replacement at that time. Those same conditions prevailed when Petitioner's Sales Manager position was subsequently eliminated. Petitioner's Sales Manager position remains unfilled. Some months after Petitioner's discharge, another sales (customer) service repre-

sentative was hired. Petitioner, contrary to his representations in his Petition herein, has never been replaced.

Assuming *arguendo* that Petitioner did prove the "replaced by a younger employee" element of the *McDonnell Douglas* formula (which he did not), the Eighth Circuit's opinion remains correct. The Eighth Circuit determined that Petitioner did not produce evidence that Petitioner's age motivated Respondent's decision to discharge Petitioner. (Pt. App. A-3, A-4). An age discrimination claimant must show that age discrimination *vel non* was the cause of his discharge. *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1706-07 (1993). Even if Petitioner did make a *prima facie* case under *McDonnell Douglas* (which he did not), that is only the beginning of the analysis, not the end. The ultimate question is age discrimination. *Id.* The Eighth Circuit, "[h]aving carefully reviewed the record in the light most favorable to Serben" [Petitioner] concluded that Petitioner "presented no direct evidence of age discrimination nor sufficient circumstantial evidence for the jury reasonably to infer Serben's age actually motivated his employer's decision." (Pt. App. A-3).

The thrust of Petitioner's argument to the jury in this case was that age discrimination could be inferred because Petitioner was within the protected age group and that Respondent knew it would save money by letting an older person go. Petitioner relied heavily on the so-called "age proxy" theory of *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987), which was subsequently specifically repudiated by this Court in *Hazen Paper Co. v. Biggins*, *supra*. All other matters offered by Petitioner were found by the Eighth Circuit to be inadequate to establish an inference of age animus. (Pt. App. A-3).

The essence of the Petition herein is to ask the Court to scour the volumes of trial evidence to determine if there was something that might support an inference of age animus. The Eighth Circuit has done so and Petitioner's case was found lacking. This

is not the type of case for consideration by the Supreme Court of the United States.

II. Response to Point II that the Eighth Circuit Imposed an Improper Burden of Proof on Petitioner

In his second point, Petitioner seems to suggest that the Eighth Circuit imposed a burden of proof on Petitioner which is not authorized by the ADEA. Such is not the case. The Eighth Circuit opinion applied the correct burden of proof. In its opinion, the Eighth Circuit clearly cut through to the most basic question - "We focus on the ultimate factual issue: whether Inter-City [Respondent] intentionally discriminated against Serben because of his age." (Pt. App. A-3). This Court has made it abundantly clear that such is the proper burden of proof and ultimate issue in any discrimination case. *Hazen Paper Co. v. Biggins, supra*; *St.Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). The real complaint of Petitioner is that the Eighth Circuit, after having carefully reviewed the record, found no direct evidence and insufficient circumstantial evidence from which a reasonable jury could find age discrimination. Again, what Petitioner seeks herein is to have the Court review the whole record in this case to determine whether it believes that a reasonable jury could find that age animus was the motivation for Petitioner's termination. The Eighth Circuit has performed that task. This is not the task of the Supreme Court of the United States.[2]

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[2] Once more, Petitioner's characterization of the evidence concerning Petitioner's position with the Respondent is not in accord with the record. Petitioner was hired to be the Sales Manager, not a subordinate customer service representative. The Sales Manager position was never reinstituted. It was abolished.

CONCLUSION

This case is not one appropriate for review by this Court. It does not present an issue of any special importance. Moreover, the Eighth Circuit Court of Appeals correctly applied the law. The Eighth Circuit properly determined that Petitioner had failed to produce evidence sufficient for a reasonable jury to determine that Petitioner's discharge was because of his age. Therefore, the Petition for a Writ should be denied.

Respectfully submitted,

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